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IN THE

Supreme Court of the United States

October Term, 1965

No. [redacted] 92

HAIK GHARIBIANS,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Appellate Department of the Superior Court of the County of Los Angeles for the State of California.

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PEOPLE OF THE STATE OF CALIFORNIA,

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Petition for a Writ of Certiorari to the Appellate Department of the Superior Court of the County of Los Angeles for the State of California.

Petitioner prays that a writ of certiorari issue to review the judgment of the Appellate Department of the Superior Court of the County of Los Angeles for the State of California in the above-entitled matter.

Opinions Below.

The trial court rendered no written opinion. A copy of its judgment as found in the transcript of the docket is set out in Appendix "A."

The Appellate Department of the Superior Court of the County of Los Angeles for the State of California rendered no written opinion. The judgment of the Appellate Department of the Superior Court is set forth in Appendix "B."

Jurisdiction.

1. The judgment of the Appellate Department of the Superior Court of the County of Los Angeles for the State of California was filed on January 14, 1965.

2. Timely petition for rehearing or in the alternative for certification to the District Court of Appeal was filed on January 20, 1965.

3. An Order Denying Rehearing or Certification to the District Court of Appeal was filed on January 21, 1965.

4. The statutory provision believed to confer on this court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S. 1257(3).

Questions Presented.

1. Whether California Penal Code Section 647a(1) as interpreted by the California Courts to provide that a defendant may be guilty of annoying or molesting a child under eighteen years, if the defendant's conduct is "so lewd or obscene as to unhesitantly irritate a normal person," is void for vagueness.

2. Whether the principle announced in *Escobedo v. Illinois,* 378 U.S. 478, is applicable to statements of a defendant, which statements, though not *per se* admissions or confessions, may be used to incriminate the defendant.

3. Whether the principle announced in *Escobedo v. Illinois,* 378 U.S. 478, is applicable once an alleged victim has accused the defendant of a crime.

Statutes Involved.

The statute involved is California Penal Code Section 647a(1). Said statute is printed in Appendix "C".

Statement of the Case.

Facts.

Petitioner was charged with two counts of violation of California Penal Code Section 647a(1).[1] Trial was had in the Municipal Court of Glendale Judicial District, County of Los Angeles, State of California. On July 9, 1964, petitioner was found guilty of both counts. The facts adduced at trial showed the following:

On April 4, 1964, at approximately 12:30 A.M. petitioner met Patrick Bender Ryan and Rod Watters, both age fifteen, at the corner of Cavanaugh and Mountain Streets in Glendale, California. How this meeting was arranged is disputed by the testimony. The parties then went for a ride, during which period of time the petitioner stopped and purchased some Country Club Stourt Beer at a liquor store. Subsequently, the parties proceeded to a motel in Glendale, California, where the petitioner secured a room. After petitioner had entered the room, the boys subsequently followed. While in the room the boys drank some of the beer which petitioner had purchased. After the boys had consumed some beer, the petitioner allegedly committed the acts for which he was convicted; the alleged acts involved the physical touching of the two boys, including the rubbing of their chests and passing his hand over the boys' private parts (petitioner denied such acts).

The parties left the motel at approximately 3:50 o'clock A.M. on April 4, 1964. Upon leaving the motel, the boys proceeded independently of the petitioner, who went to his automobile.

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[1]Petitioner was also charged with two counts of violation of Business and Professions Code §25658, giving alcholic beverage to persons under age 21, but was not convicted on such charges.

Subsequently the boys were stopped by the Glendale City Police and questioned. After the police had commenced their interrogation of the boys, one of the officers went over to the petitioner, who was in an automobile across the street in a parking lot adjacent to the motel, and asked him to remain until the officer had finished questioning the boys. The officer then returned to his interrogation of the boys. After having such further conversation with the boys and obtaining at least one of the boy's version of what happened in the motel room, the officer then proceeded to interrogate the petitioner. Statements elicited by the officer from the petitioner during this interrogation were subsequently received into evidence at the petitioner's trial over objection by defense counsel. The nature of the statements admitted, over objection, included the following:

1. Certain unfavorable statements which the officer claimed petitioner had made relative to not knowing the two boys.

2. Certain false statements initially made by the petitioner to the officer, apparently in an endeavor to avoid any involvement with the police.

How the Federal Questions Sought to Be Reviewed Were Raised and Passed on by the Courts Below.

1. *In the trial court.* The question of the improper admission into evidence of damaging statements made by petitioner in the course of the police interrogation was raised by objection to the questions on the ground that there had been no showing that petitioner had been apprised of his right to counsel or to remain silent.

The questions, the objections, and the court's rulings are found in Reporter's Transcript page 99, line 1 through page 105, line 22, and are reproduced in Appendix "D."

The question of improper admission of the police officer's testimony was also raised in a motion for new trial. The motion for new trial was denied.

The question of deprivation of due process of law through conviction under an unconstitutionally vague statute was not raised as such in the trial court.

2. *In the Appellate Department of the Superior Court.* The question of the improper admission into evidence of petitioner's statements during police interrogation was raised in the settled statement on appeal and was argued in the briefs and orally.

Since no written opinion was rendered by the Appellate Department of the Superior Court no statement can be made as to how such question was disposed of by that court.

The question of denial of due process was raised in the settled statement on appeal and was argued both orally and at length in the petitioner's opening and reply briefs.

Since no written opinion was rendered by the Appellate Department of the Superior Court no statement can be made as to how the question of deprivation of due process was disposed of by the court.

Reasons for Granting the Writ and Argument Amplifying Same.

I.

A penal statute which fails to advise a potential defendant before he acts of what the laws command or forbid is unconstitutionally vague.

Connally v. General Construction Co., 269 U.S. 385;

Lanzetta v. New Jersey, 306 U.S. 451.

In 1952 Penal Code Section 647a(1) was attacked in the California Courts as failing to be sufficiently certain. *People v. Pallares*, 112 Cal. App. 2d 895, 246 P. 2d 173. The attack was in essence twofold. First, it was argued that the words of the statute were inherently ambiguous. Secondly, and more significantly, it was asserted that because the difference between criminal and non-criminal conduct was made dependent upon the subjective emotional reaction of a child (*i.e.*, whether the child was annoyed), the statute indeed failed to provide the requisite advance notice consonant with due process. This latter point was met by the Court as follows:

> "The annoyance or molestation which is forbidden is in no sense a purely subjective state on the part of the child. The objectionable acts of a defendant constitute the annoyance or molestation contemplated by the statute." (112 Cal. App. 2d at 901-902.)

In 1955 in *People v. McNair*, 130 Cal. App. 2d 696, 279 P. 2d 800 (1955), the objectionable acts of a defendant as referred to in *People v. Pallares, supra*, were further defined. The Court stated:

"If the conduct of a defendant is so lewd or obscene that the normal person would unhesitantly be irritated by it, such conduct would annoy or molest within the purview of section 647a., subdivision (1), Penal Code." (130 Cal. App. 2d at 698.)

The language used by the Court in *McNair* has been cited again and again by the California Courts in defining "annoy or molest" as used in the statute and hence under the principle announced in *Winter v. New York,* 333 U.S. 507 (1947) constitutes the standard by which a defendant is to be judged.[2] In each of the following cases the *McNair* definition has been used by the California Courts to define "annoy or molest" in an objective sense.

People v. Fernandez, 196 Cal. App. 2d 265, 16 Cal. Rptr. 482 (1961);

People v. Carskaddon, 49 Cal. 2d 423, 318 P. 2d 4 (1957);

People v. Carskaddon, 170 Cal. App. 2d 45, 338 P. 2d 201 (1959);

People v. Thompson, 167 Cal. App. 2d 727, 335 P. 2d 249 (1959);

People v. Moore, 137 Cal. App. 2d 197, 290 P. 2d 40 (1955).

Though the California Courts in dealing with questions of vagueness inherent in Penal Code Section 647a-(1) have often found synonyms for annoy,[3] such syno-

[2]In *Winter v. New York, supra,* it was held that construction of a state statute by the courts of such state fixes the statute's meaning for the purpose of the determination of the statute's constitutionality by the United States Supreme Court as definitely as if the statute had been amended by the legislature.

[3]Under California law the word "molest" as used in Penal Code Section 647a(1) is synonymous with the word "annoy." *People v. Pallares, supra,* at 112 Cal. App. 2d 901.

nyms despite their clarity have always contained an element of the subjective reaction of the child. See for example *People v. Pallares, supra,* at 112 Cal. App. 2d 901, where the court uses such words as irk, offend, injure.

It is submitted that a standard based upon what will "unhesitantly irritate a normal person" can never pass constitutional muster.

Initially it should be noted that not all lewd or obscene acts fall within the purview of the statute. Rather, only those lewd or obscene acts "which would unhesitantly irritate a normal person" are forbidden. No quarrel is found with the use of the words "lewd" or "obscene" as these words have well-established common law meanings. It is the series of words which are used to modify "lewd" or "obscene" which create the difficulty.

The word "irritate" is certainly too vague to furnish the requisite standard. Webster's Third International Dictionary includes in its definitions of "irritate" the following: "To excite impatience, anger or displeasure in . . ." Clearly this standard dictionary definition shows full well the vagueness which is inherent in the words "irritate." When has a defendant irritated? When he has displeased or when he has angered a "normal person"? Or, must a defendant's conduct do both? Certainly one can be displeased without being angered.

The word "unhesitantly" fairs no better. Webster's Third International Dictionary, in its definition of "hesitate," includes the following: "1 a. To hold back in doubt or indecision; avoid facing a decision, encounter or problem. b. To hold back from or as if from

scruple. 2. To delay use momentarily; pause." Hence, "hesitate" can refer to a state of mind or a state of action. Which is required by the language of the *McNair* case? If the act of the defendant immediately causes some reserved sense of displeasure, is this enough? Or, does the language permit time to reflect upon the defendant's action, provided only that the ultimate conclusion is an undoubting anger?

What does seem to be clear from the *McNair* decision is that different juries faced with identical sets of facts will be free to determine what the law requires, depending upon their individual interpretations of words such as "irritate" and "unhesitantly."

Finally, assuming *arguendo* that no problem is created by the use of the words "unhesitantly" and "irritate," the term "normal person" is doubtedly so vague as to be beyond definition.

The term "normal person" might be used in either a psychological or sociological sense. In a psychological sense one might try to distinguish a "normal individual" from an "abnormal individual." The problem here, however, as pointed out by Dr. James C. Coleman, Professor of Psychology, University of California at Los Angeles, in his book ABNORMAL PSYCHOLOGY AND MODERN LIFE, at page 12, is that:

> "A sharp dividing line between 'normal' and 'abnormal' behavior simply does not exist, contrary to popular belief . . . Not only does the behavior of different individuals range by imperceptible degrees from the normal to the abnormal, but one individual may shift at different times to different positions along the range."

In a sociological sense the term "normal person" might be taken to describe the statistically average American. However, it is clear that the very heterogenous make-up of our Nation, with the varying religious, national and economic background of our people, creates a situation in which no such statistically average American can be found. As stated in THEY AND WE, by Peter I. Rose, Professor of Sociology and Anthropology at Smith College and University of Massachusetts, at page 15:

> "Between the prescriptions set forth in the Preamble to the Constitution and the Bill of Rights and the actual behavior of many people there exists a wide range of circumscribed standards of behavior which vary markedly from group to group, from place to place, and from time to time. The formal and informal policies of the region, state, and local community; the social, economic, religious and political groups to which one belongs; the attitudes of parents, teachers, and peers; and the demand of particular intergroup and interpersonal situations of interaction, *all* greatly influence the ways in which individuals act toward others."

Hence, regardless of whether the term "normal person" be used in a psychological or sociological vein, the term is one which has little or no meaning in fact and is therefore totally vague and ambiguous.

In the case at bar, the petitioner is a resident alien of the United States. If his conviction is allowed to stand, he will not only be subject to a six-month jail sentence prescribed by the trial court, but what is far

more significant he will be subject to deportation as an alien convicted of two crimes involving moral turpitude.[4]

Moreover, even assuming that petitioner would not be subject to such a harsh penalty as deportation, he nonetheless would under California law be branded as a "sex offender" and hence be required to register as such with the Chief of Police in every California city where he might thereafter reside. Such registration might be required to continue for the rest of petitioner's life, long after he had served the sentence pronounced by the trial court.[5]

Every year hundreds of Californians are branded for life as "sex offenders" because of convictions under Penal Code Section 647a. Statistics are not available for convictions in the Justice and Municipal Courts (where

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[4]8 U.S.C. 1251(a)(4) provides that every alien who "is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial."

Assuming petitioner's two convictions in this case would be determined to arise out of a single scheme, petitioner may nonetheless face deportation in that in 1956 petitioner was convicted in the Los Angeles Superior Court of violation of P.C. 470-Forgery.

[5]Under California Penal Code Section 290 every person convicted of specified crimes including Section 647a(1) must register as a sex offender with the appropriate law enforcement agency in every city in which he subsequently resides. Unless the defendant can qualify to have the conviction expunged under California Penal Code Sections 1203.4 or 1203.4a, the requirement of registration remains for the duration of the defendant's life. *Kelly v. Municipal Court*, 160 Cal. App. 2d 38, 324 P. 2d 990 (1958).

petitioner was convicted),[6] but the records of conviction in the Superior Courts of California as maintained by the Bureau of Criminal Statistics in the office of the State Attorney General show the following:[7]

Convictions	1962	105
Convictions	1963	114
Convictions	1964	101

In addition, it is to be noted that certain of these persons are being convicted not for what they did but rather simply for what they said. A conviction under California Penal Code Section 647a(1) does not require that the defendant do any physical act; mere words are enough. *People v. McNair, supra; People v. Thompson, supra, People v. Carskadden,* 170 Cal. App. 2d 45, 338 P. 2d 201. In the latter case a defendant was convicted solely for statements made to a 17-year-old girl.

It is submitted that where a conviction is based upon a statute which is so inherently ambiguous and where such conviction can lead to the ultimate deportation of the petitioner, that the Supreme Court should review the decision particularly in view of the fact that the statute is being applied to convict hundreds of Californians every year and brand them for life as "sex offenders" sometimes in circumstances where the only conduct of the defendant was an act of speech alone.

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[6]All first offenses under Penal Code Section 647a(1) are misdemeanors and are therefore filed in either justice or municipal courts.

[7]The statistics cover convictions under Penal Code Section 647a(1) and 647a(2). No breakdown between the two subdivisions is available. Penal Code Section 647a(2) is set forth in Appendix "E." In addition, certain of the convictions involved misdemeanors (even though in the Superior Court) because the convictions arose out of a finding of guilty on a charge other than that with which the defendant was originally charged.

II.

In the case at bar, there was received into evidence, over petitioner's objection, testimony of a police officer concerning the officer's interrogation of petitioner. The interrogation itself took place after the officer had questioned the two boys whom petitioner had allegedly molested and at least one of the boys had fully related what had previously transpired that evening insofar as the acts of petitioner were concerned. No arrest had been made prior to the interrogation of petitioner but petitioner had been required by the police to remain for interrogation until the police had finished their questioning of the two boys.

Included among the officer's testimony were various statements of petitioner, which, though not confessions or admissions, were damaging because such statements were untrue and were made apparently for the purpose of avoiding involvement with the authorities.

In view of the importance of the decision in *Escobedo v. Illinois,* 378 U.S. 478, and the potential deportation of defendant, it is submitted that the court should grant certiorari herein in order to clarify when an investigation can be said to have focused on a particular defendant and whether the principle announced in *Escobedo* is applicable to damaging statements which do not constitute confessions or admissions.

Conclusion.

The petition for writ of certiorari should be granted.

Respectfully submitted,

DAVID ARTHUR BINDER,
Attorney for Petitioner Haik Gharibians.

APPENDIX "A".

It is the order of the court that defendant be sentenced to 180 days in the Los Angeles County Jail on Count I. . . . Court orders defendant to serve 180 days in the Los Angeles County Jail on Count 2. *It is the further order of the Court* that said sentences are to run concurrently. . . .

August 6, 1964.

APPENDIX "B".

In the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

Superior Court No. CR A 5975

People of the State of California, Plaintiff and Respondent, vs. Haik Gharibians, Defendant and Appellant.

Trial Court No. M 21545

On Appeal from the Municipal Court of the Glendale Judicial District, County of Los Angeles, State of California. Kenneth A. White, Judge.

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is ORDERED and ADJUDGED that the judgment as to Count I made and entered in the Municipal Court of the Glendale Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same is hereby affirmed. The judgment as to Count II is reversed with directions to re-sentence

in accordance with law. The appeal from order denying motion for new trial is dismissed. (P.C. 1466.)

January 14, 1965.

By the Court

Huls,
Presiding Judge.

Smith,
Judge.

Swain,
Judge.

APPENDIX "C".

California Penal Code §647a(1).

Every person who annoys or molests any child under the age of 18 is a vagrant and is punishable upon first conviction by a fine not exceeding five hundred dollars ($500) or by imprisonment in the county jail for not exceeding six months or by both such fine and imprisonment and is punishable upon the second and each subsequent conviction or upon the first conviction after a previous conviction under Section 288 of this code by imprisonment in the state prison for not less than one year.

APPENDIX "D".

HAROLD HINDS, JR.

called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, sir.

The Witness: Harold Hinds, Jr.

The Clerk: Thank you. How do you spell that?

The Witness: H-i-n-d-s.

DIRECT EXAMINATION

By Mr. Moore:

Q. Officer, what is your business or occupation? A. Police officer, City of Glendale.

Q. Were you employed in that capacity on April 4, 1964? A. Yes, sir.

Q. On that date, did you see the preceding witnesses, Rod Watters and Pat Ryan? A. Yes, I did.

Q. What time did you see them? A. It was approximately 3:50 a.m.

Q. Where did you see them? A. They were standing on — just off the parting lot across from the Astromotel, the 300 block East Colorado.

Q. When you saw them, what did you do? A. I turned my police vehicle around, stopped, talked to them.

Q. After you talked to them, what did you do? A. What do you mean after I talked to them?

Q. Did you see the defendant as you were talking to the witnesses? A. Yes, I did.

Q. Where was he? A. He was in his vehicle driving out of the parking lot of the Astromotel.

Q. What kind of vehicle was that? A. 1963 Jaguar, XK-E.

Q. Do you recall the license number? A. No, I don't.

Q. What did you do upon seeing the defendant? A. I asked him to sit and wait over there while I questioned the two boys.

Q. Did he stay on the lot? A. Yes, he did.

Q. Did you go to the automobile later and talk to him? A. Yes, I did.

Q. All right. What did you first see when you went to the vehicle? A. I asked—well, first I asked him to get out of the car, and I observed inside the vehicle some cans of beer.

Q. And did you talk to the defendant? A. Yes, I did.

Q. Did you ask him for some identification? A. Yes, I did.

Q. Did he show you any? A. Yes. He produced his driver's license and stated that he was a practicing intern, working at the Hollywood Medical Center on Hollywood Boulevard.

Q. And what did his identification show? A. I believe it was Dr. Haik Gharibians.

Q. Now, were there any witnesses at the time you talked to the defendant? A. Myself and the defendant.

Q. About what time was this? A. This was approximately 4:00 a.m.

Q. Was this also on April 4? A. Yes.

Q. Were the statements he made at the time freely and voluntarily made? A. Yes, they were.

Q. What did you say to the defendant and what did he say to you?

Mr. Lakritz: I would object to the introduction of any statement by the defendant to the police officer unless there is a foundation laid in accordance with the latest decision of the Supreme Court of the United States.

The Court: Do you wish to lay your foundation?

Mr. Moore: I believe—

The Court: The objection is overruled.

Mr. Lakritz: The latest decision of the Supreme Court having reference to the introduction into evidence of any kind of confession or admissions made by a prime suspect in a criminal action, and I believe the Supreme Court held some such statements or admissions or confessions would be inadmissible unless the defendant had prior been advised of his right to obtain counsel and to have counsel present.

The Court: Now, the objection is overruled. Read the question, please, Miss Reporter. (Record read.)

The Witness: After I had his identification in my possession, I asked him if he knew the two young men *standing across the street on Colorado.*

Mr. Lakritz: Your Honor, again, I don't wish to interrupt. I want to be clear on that continuing objection to this line of questioning having reference to any conversation or admissions as to any type of testimony by this police officer with this particular defendant on the grounds and basis that I have stated before, if I am not mistaken the exact holding of that case—I stand on whatever the holding of that case is, and I make any objection based on the language and holding of that case.

The Court: Now, actually, there is no question pending at this time, either.

Mr. Lakritz: No. There was. He answered the question.

Mr. Moore: What was the last question and answer?

(Record read.)

Q. By Mr. Moore: What did he say?

Mr. Lakritz: Your Honor, I object.

The Court: The objection is overruled.

Mr. Lakritz: But it is under—

The Court: I understand the grounds.

Mr. Lakritz: I continue to stand on—

The Court: You go to the step of whatever objection you are going to make when the opportunity and occasion arises.

Mr. Lakritz: All right. Thank you.

The Witness: At this time I asked him when I had his identification in my possession—

Mr. Lakritz: I object again to this particular question on the same grounds and same bases as the prior objections.

The Court: The objection is overruled.

Will the reporter read the question.

(Record read.)

The Witness: He stated, no, he did not know the two boys standing across the street.

Q. By Mr. Moore: What did you next ask him? A. This time—

Mr. Lakritz: I again repeat the objection.

The Court: Objection is overruled.

Mr. Lakritz: Thank you.

The Witness: I asked him to whom the beer cans belonged and he stated they belonged to him.

Q. By Mr. Moore: What did you next ask him?

Mr. Lakritz: Again, I object.

The Court: Objection overruled on the same grounds.

Mr. Lakritz: Thank you.

The Court: Do you know what the question was?

(Record read.)

The Witness: I don't really exactly.

Q. By Mr. Moore: What were the further conversations you had with him?

Mr. Lakritz: To which again I object.

The Court: Overruled on the same ground.

The Witness: He stated that he did not know Watters, and he had seen the two hitchhiking earlier in the evening and had picked them up.

Q. By Mr. Moore: Was there any further conversation with the defendant?

Mr. Lakritz: To which, again, I object and move to strike all of these questions.

The Court: The motion to strike and the objection is overruled on the same grounds.

Mr. Lakritz: I move to strike all of the answers of this particular officer as to all of the last ten or so questions.

The Court: The motion to strike is denied on the same grounds.

The Witness: I asked Mr. Gharibians if he had any beer. I directly asked Mr. Gharibians if he had given the boys any beer, and he said only one can or glass.

Q. By Mr. Moore: Was there any further conversation?

Mr. Lakritz: Again, restate my objection at this time and move to strike any answer.

The Court: The motion to strike is denied and the objection is overruled.

The Witness: I specifically asked about the two boys and he said, no, he definitely did not.

Q. By Mr. Moore: Is that all of the conversations you had with the defendant? A. That's all.

Mr. Moore: No further questions.

Mr. Lakritz: No questions.

The Court: Step down, Mr. Hinds.

Mr. Moore: The People rest, your Honor.

APPENDIX "E".

California Penal Code §647a(2).

Every person who loiters about any school or public place at or near which children attend or normally congregate is a vagrant, and is punishable by a fine of not exceeding five hundred dollars ($500) or by imprisonment in the county jail for not exceeding six months, or by both such fine and imprisonment.